in the

Supreme Court

of the

United States

OCTOBER TERM, 1977

NO. 77-1589

JOSEPH THOMAS OLIVETI,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

CASES CITED Page

CASES CITED **Page**

Page

STATUTES

OTHER AUTHORITIES

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The Petitioner, JOSEPH THOMAS OLIVETI, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled action on February 9, 1978, in which case the Petitioner was one of the appellants.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 567 F. 2d 638, and appears as a matter of convenience as Appendix A to this petition. The following items are also included as part of the Appendix:

Appendix B, Motion for Extension of Time Within Which to File Brief, filed May 5, 1977

Appendix C, Joint Motion for Extension of Time Within Which to File Brief, filed June 1, 1977

Appendix D, Cover Page of the Brief filed by Appellant, Joseph Thomas Oliveti, with Co-Appellant, Benton Franklin Thomas in the United States Court of Appeals for the Fifth Circuit

Appendix E, Rule 12 Statement for Rehearing En Banc, filed February 17, 1978

Appendix F, Joint Motion for Judgment of Acquittal and Memorandum of Law in Support Thereof, filed February 1, 1977.

Appendix G, Joint Motion for New Trial and Memorandum of Law in Support Thereof, filed February 1, 1977

Appendix H, Order Denying Defendants' Motion for New Trial and Denying Defendants' Joint Motion for Judgment of Acquittal, filed February 22, 1977

Appendix I, Indictment

JURISDICTION

The date of the Judgment of the Fifth Circuit Court of Appeals (Appendix A) and the date it was entered was February 9, 1978.

The jurisdiction of this Court to review the abovementioned decree of the said Court of Appeals is invoked under the provisions of 28 U.S.C.A., Section 1254(1).

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;. . ."

QUESTIONS PRESENTED

1) Did the Trial Court err in allowing the hearsay statements of one defendant concerning an indicted co-defendant in regards to the conspiracy before the prima facie case of conspiracy is established?

2) The conduct of the Law Enforcement agents was so outrageous that the Petitioner's due process rights under the Fifth Amendment were violated.

3) Are the overt acts charged in the indictment not overt acts as understood to be within the traditional boundaries of conspiracy, and if so, does the proving of said acts without any further overt acts bar conviction?

4) Does material error occur when the court allows hearsay statements of co-defendant to an alleged conspiracy over the objection of the defendants' counsel before the proffer of a prima facie case against that defendant without complete warning or cautionary statement from the court?

5) Is the Conspiracy Statute 21 U.S.C. 963 violative of the First Amendment to the United States Constitution without any overt acts but mere speech or association with two or more individuals?

6) Was it material error of the lower court to allow the jury to have the knowledge of the fact that the conversations testified to by the Drug Enforcement Administration agents were taped by said agents at the time and that the tapes were known to exist and were present at trial, and that said tapes were not presented to the jury.

7) Does the failure of privately employed counsel to inform and disclose to the Defendant/Petitioner-client information that he is discussing and ultimately does enter into a legal partnership for the practice of law with counsel for Petitioner-client's co-defendant, such co-defendant's interest at the trial being in conflict with the Petitioner, so taint and color such legal representation to effectively deny that client's Sixth Amendment guarantee to independent legal representation afforded by the Constitution of the United States?

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED and PERTINENT PORTIONS OF THE FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY

The Amendments to the Constitution provide in pertinent part:

AMENDMENT I.

"Congress shall make no law . . . bridging the freedom of speech or of press; or of the right of the people peaceably to assemble. . ."

AMENDMENT V.

"No person . . ., nor be deprived of life, liberty or property, without due process of law; . . ."

AMENDMENT VI.

"In all criminal prosecutions, the accused shall . . ., be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

AMENDMENT XIV.

Section 1:

". . . no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the law."

21 U.S.C. 952(a)

"It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V or title II, . . ."

21 U.S.C. 963
Attempt at Conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY — DR 5-105

"Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer . . .

> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(c)
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation of the exercise of his independent professional judgment on behalf of each."

STATEMENT OF THE CASE

The Petitioner, JOSEPH THOMAS OLIVETI, was indicted with others in the United States District Court of the Southern District of Florida on a charge of violating the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. 963.

The Prosecution's case at trial introduced testimony from various Drug Enforcement Administration Agents of sixteen meetings between the agents and Petitioner, OLIVETI, and co-defendant, THOMAS.

The testimony showed that THOMAS was involved in each of the sixteen meetings and that OLIVETI was involved in but two of said meetings.

A more complete and detailed statement of the facts is presented in the opinion of the Appellate Court in Appendix A.

ARGUMENT

POINT I.

DID THE TRIAL COURT ERR IN ALLOWING THE HEARSAY STATEMENTS OF ONE DEFENDANT CONCERNING AN INDICTED CO-DEFENDANT IN REGARDS TO THE CONSPIRACY BEFORE THE PRIMA FACIE CASE OF CONSPIRACY IS ESTABLISHED.

Petitioner contends that the trial judge committed reversible error in allowing co-conspirator hearsay declarations to go before the jury without first making a legal finding that the government, by evidence independent of the co-conspirator declarations, had established a prima facie case of the existence of a conspiracy and his participation therein.

In *United States v. Oliva*, 497 F. 2d 130 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit set forth the standard to be used by a trial judge in determining the sufficiency of evidence other than hearsay to establish the existence of a conspiracy and a defendant's participation therein. At pages 132-133, that court states:

> We define the test as whether the government, by evidence independent of the hearsay declarations of a co-conspirator, has established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is whether the other evidence aliunde the hearsay would be sufficient to support a finding by the jury that the defendant was himself a conspirator.

That Court also stated that only if the conspiracy and a defendant's participation therein is proved prima facie by independent evidence is the trial judge justified in admitting hearsay statements for the *jury's* consideration; and, further, that the above test must be met before the judge may even allow declarations of a co-conspirator to go before the jury. *Oliva* at 132. See also *United States v. Apollo*, 476 F. 2d 156, 159 (5th Cir. 1973); *Montford v. United States*, 200 F. 2d 759, 760, (5th Cir. 1952).

Prior to and during the trial, counsel made repeated efforts, as well as numerous motions and objections, to alert the trial judge to the anticipated and present hearsay problem in the case. Counsel, being obviously aware of the one (1) count conspiracy indictment and the co-conspirator hearsay declarations about to come forth that was clearly adverse to Petitioner OLIVETI, requested the trial judge to follow the Fifth Circuit's precedent set forth in the *Oliva* case regarding the admissibility of co-conspirator hearsay declarations (T. 39-43; 86-88; 110; 113-114; 124-126; 133; 143; 260-261). Notwithstanding these efforts, the trial judge refused to make a legal finding under the *Oliva* test and permitted *all* of the hearsay declarations to go before and be considered by the jury. Over repeated and numerous objections, the trial judge gave in excess of thirty (30) cautionary instructions and allowed the admission of co-conspirator hearsay in spite of the government's failure at trial to ever produce *independent* evidence of the existence of a conspiracy and the petitioner's participation therein.

As the record and transcript of trial proceedings reflect, there were several telephone conversations be-

tween agents of the Drug Enforcement Administration and defendant THOMAS. Neither Petitioner OLIVETI nor any other alleged co-conspirator were privy to any of these communications. Further, there were sixteen (16) meetings between various agents of DEA and defendant, THOMAS. Petitioner, OLIVETI was present at only two (2) of these meetings.

The trial court did not make a decision, as a matter of law, on whether the Petitioner, OLIVETI was involved in a prima facie case of conspiracy prior to the time of admitting the hearsay testimony. The questions being, did Petitioner, OLIVETI, (1) know of the existence of a conspiracy and; (2) did he have knowing participation in that conspiracy.

The only *independent* evidence offered by the government to connect Petitioner, OLIVETI with the conspiracy to import cocaine and marijuana may be summarized as follows: (a) his presence and statements at the two (2) July meetings during which he stated that he was capable of obtaining airplanes, boats, crews and could handle the operation (T.344); however, agent Marin testified that OLIVETI never carried out the above (T. 368); and, his statement that his people could arrange to smuggle the cocaine to be provided by the government's own contact; again; however, the arrangements were never made (T. 104-111; 198-200; 204; 228; 240-246; 347-350; 369-374).

Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), the government did not present and the trial court did not decide if, from the *independent* evidence offered, could "reasonable minds conclude that the

evidence was inconsistent with the hypothesis of the accused's innocence," *Oliva, supra,* at 134 citing *United States v. Warner,* 441 F. 2d 821, 825 (5th Cir. 1971), *cert. denied* 404 U.S. 829 (1971). See also *United States v. Haggins,* 545 F. 2d 1009, 1013 (5th Cir. 1977).

The *only independent* evidence as to Petitioner, OLIVETI, is two (2) meetings. During these meetings OLIVETI said he would make certain arrangements which the agents testified he never made (T. 368). There was no showing that Petitioner, OLIVETI or any other indicted co-conspirator ever came to an agreement on what price, quantity or quality of narcotics were to be smuggled, when, how or by whom. There was no showing that any of the alleged co-conspirators ever committed a single overt act in furtherance of and to achieve the illegal objective of the alleged conspiracy. However, Petitioner OLIVETI never delivered anything to the DEA agents.

This meager evidence is simply not supportive of a jury finding of conspiracy. The necessary predicate was lacking and hence the hearsay testimony should not have been permitted to go before the jury. Without the benefit of this hearsay (and the trial judge's refusal to apply the *Oliva* test), the government's conspiracy charge falls.

Petitioner, OLIVETI respectfully submits that his situation is compounded because of the admissibility of co-conspirator hearsay statements made at fourteen (14) meetings and additional telephone conversations in which he took no part and which spanned the time period of January, 1976, through August of 1976. The sheer weight and nature of these co-conspirator hearsay

declarations were such as to sweep Petitioner OLIVETI under and deprive him of his constitutional rights under the Fifth and Sixth Amendents to the United States Constitution.

The trial judge should have made a legal finding that there was sufficient independent evidence to make a prima facie showing of the existence of a conspiracy and Petitioner's participation therein before allowing the jury to hear and consider the hearsay declarations. Further, the evidence was insufficient as a matter of law to establish the very essence of a conspiracy, to-wit: an agreement between two (2) or more people (other than federal agents) to violate the law; and, further, assuming *arguendo* the existence of a conspiracy, no overt act was committed in furtherance of and to achieve the illegal objective of same. *United States v. Barrera*, 547 F. 2d 1250, 1256 (5th Cir. 1977). The trial judge having refused to apply the *Oliva* test and permitting the case to go to the jury allowed Petitioner, OLIVETI to be overwhelmed by the "dragnet of conspiracy" and be convicted by what amounted to no more than an abundance of near absurd conversation.

Since the hearsay testimony formed a vital link in the government's case and since the evidence was insufficient as a matter of law to support the crime charged, Petitioner, OLIVETI respectfully requests that this court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the decision.

POINT II.

THE CONDUCT OF THE LAW ENFORCEMENT AGENTS WAS SO OUTRAGEOUS THAT THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT WERE VIOLATED.

The Petitioner contends that the conduct of the Drug Enforcement Administration's agents went beyond entrapment as a matter of law and was so outrageous in the case *sub judice* that due process principles absolutely bar the government from invoking judicial processes to obtain a conviction. *Hampton v. United States*, 425 U.S. 484, 96 S. Ct. 1646, 1649 (1976); *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 1643 (1973); *United States v. Puma*, 548 F.2d 508, 510 (5th Cir. 1977).

As the record reflects, agents of the DEA first met with Co-defendant, Thomas, on January 9, 1976 (T. 170-173). From this first meeting to the last on August 5, 1976, Thomas offered excuse after excuse why he could not deliver narcotics and reason after reason why he needed money. After five (5) months of meetings, telephone conversations and numerous discussions with co-defendant, Thomas, without the production of a scintella of narcotics by any of the alleged co-conspirators, the DEA case agent, Robert Fredericks, and agent Armando Marin, for reasons best known to the government (frustration was denied — T. 248; 363; 373), on May 26, 1976, offered to provide a government aircraft, flight crew and pay the expenses to have co-defendant Thomas fly to Colombia, obtain the narcotics and smuggle it into the United States. Petitioner, OLIVETI,

was never involved in those telephone conversations or discussions. Neither the Petitioner nor any of the other alleged co-conspirators availed themselves of this government offer to provide the manner and means of smuggling the narcotics (T. 163-166; 195-196; 203-204; 228; 335-337; 363-367; 372). Further, the same government agents on July 28, 1976, after seven (7) months of absolutely nothing except talk, met with defendants, Thomas, Cochran and Petitioner, OLIVETI, at the Tastee Inn Lounge, Miami, Florida (T. 104; 347). During this meeting, for reasons again best known to the government (frustration still denied — T. 248; 363; 373), agent Marin stated that he had a contact in Colombia who could provide one hundred (100) kilos of cocaine; but, his people needed someone to go get it and smuggle the 100 kilos into the United States. None of the alleged co-conspirators ever availed themselves of this generous government offer (T. 104-111; 198-200; 204; 228; 240-246; 347-350; 369-374). Approximately three (3) weeks later, the Petitioner and the other three defendants were arrested for conspiracy.

As can be seen from the above, the government from January 9, 1976, to July 28, 1976, went "full circle" to the extent that government agents were going to not only provide the manner and means of smuggling the narcotics, to-wit: the aircraft, flight crew and expenses; but also, the actual contraband itself. Even Group Supervisor Peter Scrocca testified that the above is not an acceptable DEA practice (T. 289). Such outrageous conduct on the part of law enforcement agents cannot and should not be condoned or tolerated. This type of police activity is exactly that which was envisioned and implicitly condemned by the Supreme Court in *Hampton* and *Russell.* It is also that type of police con-

duct struck down by the underlying policy inherent in previous Fifth Circuit decisions of *United States v. Evers,* ____ F.2d ____, (No. 76-1755, 5th Cir. May 26, 1977), *United States v. Puma, supra, United States v. Mosely,* 496 F.2d 1012 (5th Cir. 1974), *United States v. Oquendo,* 490 F.2d 161 (5th Cir. 1974), *United States v. Workopich,* 479 F.2d 1142 (5th Cir. 1973), and *United States v. Bueno,* 447 F.2d 903 (5th Cir. 1971).

The government, having engaged in such outrageous conduct resulting in the denial of the defendants' due process rights under the Fifth Amendment to the U.S. Constitution, should be barred from invoking judicial processes to obtain a conviction.

POINT III

ARE THE OVERT ACTS CHARGED IN THE INDICTMENT NOT OVERT ACTS AS UNDERSTOOD TO BE WITHIN THE TRADITIONAL BOUNDARIES OF CONSPIRACY, AND IF SO, DOES THE PROVING OF SAID ACTS WITHOUT ANY FURTHER OVERT ACTS BAR CONVICTION

The overt acts charged in the indictment are, in essence, just meetings of the Petitioner, OLIVETI, and his other co-defendants and agents of the Drug Enforcement Administration.

Overt acts as understood within the traditional meaning of said acts in conspiracy are the acts of the co-conspirators after the conspiracy has been decided upon. Once the conspirators agree to perform certain illegal acts, the movement towards the completion of those acts, however minute, is the overt act to put forth the plan of the conspiracy. To say that a meeting to discuss a conspiracy is in itself an overt act makes the act of conspiring to conspire a criminal violation against the United States. Such could never be the intent of Congress.

It is the position of Petitioner, OLIVETI that if an overt act was needed to convict in the indictment, which is the obvious intent of the United States Attorney who presented such information to the Grand Jury, then the act of the meeting to develop the conspiracy, cannot, at one and the same time, be the overt act necessary to prove up that conspiracy.

To say that the meeting with the Drug Enforcement Administration's agents are the overt acts themselves is begging the question. If the meetings produce a conspiracy, then only actions after those meetings can be considered overt acts in pursuance of a conspiracy, by definition.

If the government has undertaken the burden to prove overt acts, then those acts must indeed be acts in furtherance of the alleged conspiracy and not the "act" of the meetings where the alleged conspiracy first was developed.

POINT IV.

DOES MATERIAL ERROR OCCUR WHEN THE COURT ALLOWS HEARSAY STATEMENTS OF A CO-DEFENDANT TO AN ALLEGED CONSPIRACY OVER THE OBJECTION OF THE DEFENDANTS' COUNSEL BEFORE THE PROFFER OF A PRIMA FACIE CASE AGAINST THAT DEFENDANT WITHOUT COMPLETE WARNING OR CAUTIONARY STATEMENT FROM THE COURT?

Each time the government attorney proffered proof of a hearsay statement as to Petitioner OLIVETI, without the showing of a prima facie case to Petitioner OLIVETI, trial counsel would make a timely objection. The court then would in each and every situation override the objection and then would give instructions to the jury of the court's view as to proof necessary for defendant OLIVETI.

The first time the court gave complete instructions as follows: Trial transcript 114, line 23, "you must understand, ladies and gentlemen, that you must find proof beyond a reasonable doubt that a conspiracy existed and that the defendants were members of that conspiracy before you may consider or hold against an absent defendant any statement made by the other defendant. At this meeting, of course, Mr. Oliveti was not present."

The trial court in the nearly thirty (30) objections raised by trial counsel with regard to absent statements where Petitioner OLIVETI was not present, the court

again gave the aforementioned instruction to the jury. But within a short passage of time, the court would give a "shorthand" rendition of the said instructions, example as follows: Trial transcript — page 164, line 11, the court, "same ruling"; page 320, line 12, the court "overruled. The same instructions previously given to the jury regarding the need of proof as to the existence of a conspiracy and so forth is reiterated"; page 323, line 18, the court "I will make the same ruling. It is overruled with the same instructions to the jury that I gave concerning a conspiracy hearing."; page 332, line 14, the court, "overruled — same instruction to the jury".

We must always remember that a jury in a criminal trial is made up of laymen. The members of the jury are unfamiliar with the legal technicalities built up by our profession to protect the rights of accused defendants. One of the most important rights is the rulings from the bench especially directed to juries on what to take into consideration in their deliberations and what to disregard. It is the cornerstone of our system of justice that the rulings from the bench are solemn and judicial in nature. The fact that the trial of the Petitioner involved numerous problems with hearsay in the conspiracy context, does not negate the obligation of the court to make very clear to the jury at the timely objection of defense counsel as to the admissibility and weight of the testimony being heard by the jury.

The effect of the court relegating the warning to the jury on the hearsay problem as saying "the same instruction previously given to the jury", page 320, line 12, supra: "same instruction to the jury that I gave concerning a conspiracy hearing", page 332, line 14, gives an impression to the jury adverse to the defendant, to wit,

that this is a mere technicality and something perhaps that the jury can ignore if they so choose.

The rule as argued elsewhere in this brief that hearsay is inadmissible until the prima facie case of conspiracy is proved, lends itself to further problems in the context of the thirty (30) warnings that should have been more clearly made to the jury. The hearsay evidence given with warning to the jury does in effect, add credance to the proposition that the Petitioner, OLIVETI, was in fact, a member of the conspiracy by the sheer weight of the thirty times the objection was made and the weakness of the jury instruction. Allowing the jury to hear such reiteration of hearsay testimony violates the Fifth Amendment protections of the Petitioner in that it denies him the right to confront his witnesses.

The conduct of the court in this case cries out for a reversal of the decision of the Fifth Circuit and an instruction for remand for a new trial. F.R. Crim. P. 52(b).

POINT V.

IS THE CONSPIRACY STATUTE 21 U.S.C. 963 VIOLATIVE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION WITHOUT ANY OVERT ACTS BUT MERE SPEECH OR ASSOCIATION WITH TWO OR MORE INDIVIDUALS?

Conspiracy in historical context has always been thought of as the agreement between two or more persons to perform an illegal act. The standard used for conviction has always been the performance of one overt act no matter however slight to further the conspiracy, for which all the parties are accused.

Certain statutes passed by Congress specifically point to overt acts necessary for a conviction thereunder. However, 21 U.S.C. 963 does not require the overt act. However, most of the cases that convict accused conspirators have always had some act involved in the conspiracy, overt or not.

The position of Petitioner OLIVETI is that no acts at all took place on the factual situation of which he is convicted in the Court below. In fact, all that transpired were conversations and meetings. Petitioner OLIVETI holds firmly to the position that all acts performed were protected by the First Amendment rights of speech and association.

The entire record below reflects constant puffing and fluff in the conversations between the Drug Enforcement Administration agents and the defendants. They

are statements filled with "sound and fury signifying nothing." See *Hamlet,* William Shakespeare.

A conspiracy does not require "mission accomplished" only "mission attempted". *United States v. Brut,* 366 F.2d 377, 389 (9th Cir., 1966), Cert. denied, 386 U.S. 912, 87 S. Ct. 861, 17 L. Ed.2d 784 (1967), *United States v. Dixon,* 547 F.2d 1079 (9th Cir., 1976). There is no "mission attempted" in the case below. All we have are endless or mindless conversations leading to nothing. In other cases tried under these statutes, there were always overt acts. A co-conspirator travels to Mexico to bring payments to the person for whom a controlled substance was being purchased. *United States v. Martin,* 567 F.2d 849 (9th Cir., 1977).

If we can talk of any acts of any of the co-conspirators below, we can talk only about the delivering of the "sample" of amphetamines delivered to the Drug Enforcement Administration agents by co-conspirator, Thomas. That sample however, turned out to a common antihistamine or cold pill. See opinion in Appendix A. The Fifth Circuit held in *United States v. Binetti,* 552 F.2d 1141 (5th Cir., 1977) that where even if a defendant had known of but not participated in a drug sale conspiracy prior to a transaction with government agents in which defendant took an active role, but that sale did not involve the controlled substance, but a harmless non-controlled substance which was passed off to the agents as cocaine, defendant could not be convicted of conspiracy or the substantive offense.

If we agree, arguendo, that conversation that is protected by the First Amendment can become conspiratorially criminal, there must be a point that is

reached where mere words do become a criminal act. To allow a conviction, there must be proof of an intent to agree to do the wrongful act. The statute does not forbid "merely collective conversation" but prohibits the act of attempting or agreeing to commit one of the substantive offenses defined in the sub-chapter. Not only must there be proof of an agreement, but also, proof of an intent to agree to do the wrongful act, since "a conviction upon the basis of association alone may not stand." *United States v. Amidzich, et al.* 396 F. Supp. 1140 (E.D. Wis. 1975) quoting, *United States v. Tyler,* 505 F.2d 1329-1332 (5th Cir., 1975).

The decisions upholding these statutes saying an overt act is not needed, belies the factual situation upon which those decisions are based. In *United States v. Umentum,* 547 F. 2d 987 (7th Cir., 1976), the Court goes through the history of the cases upholding the fact that no overt acts are needed for conspiracy conviction under 21 U.S.C. 846. Yet the facts in *Umentum,* supra. show that there was a delivery of a powder by the defendants. A delivery of any substance would be considered an overt act. See also *United States v. Umentum, et al.,* the District Court case at 401 F. Supp. 746. See *United States v. Binetti,* supra.

The recent Fifth Circuit case of *United States v. Hansen,* 569 F. 2d 406 (5th Cir., 1978) touches and parallels this case very closely. However, it has the added feature of the fact that the conspirators did leave the country in an airplane and come back with the controlled substance, to-wit, marijuana. In *United States v. Dreyer,* 533 F. 2d 112 (3rd Cir., 1976), the court speaks that overt act again is not essential to a conviction under the Controlled Substances Import and Export Act, 21

U.S.C. 846, 963. However, again the fact belie the lack of an overt act. There was 856 pounds of hashish found in a camper owned by one of the defendants.

Petitioner, OLIVETI agrees that free speech is not absolute. The classic of crying "fire" in a crowded theater is not protected speech. Words alone in a context of immediate danger are also not protected. The Federal Aviation Act of 1958, 49 U.S.C. 1472(m) prohibits and makes a criminal act the threatening of a highjacking of an airplane. Such a threat at an airport by an individual is certainly a clear and present danger and would fall within the area of speech not protected by the First Amendment. See *Taylor v. United States,* 358 F. Supp. 384 (S.D. Fla. 1973).

The facts in the case below show no overt acts, no delivery of any controlled substance, no movement to consummate any delivery by Petitioner OLIVETI or any other act other than mere conversation at various restaurants in the South Florida area. To allow such a conviction to stand would chill the innocent conversations of persons discussing the potential magic riches of an illicit act. Such conversation could be extended to the discussion of people innocently talking about a bankrobbery on payroll day; how nice it would be to have all the money at the track on a heavy Saturday night, or any other innocent but tempting attempt to gather a great amount of money illegally in one fell swoop. Simple Fantasy!

The attorney for Petitioner OLIVETI has failed to find any case reported, wherein the Court talks of the overt act being unnecessary, but in fact an overt act always appears in the factual situation given by the Court in its decision.

POINT VI.

WAS IT MATERIAL ERROR OF THE LOWER COURT TO ALLOW THE JURY TO HAVE THE KNOWLEDGE OF THE FACT THAT THE CONVERSATIONS TESTIFIED TO BY THE DRUG ENFORCEMENT ADMINISTRATION AGENTS WERE TAPED BY SAID AGENTS AT THE TIME AND THAT THE TAPES WERE KNOWN TO EXIST AND WERE PRESENT AT TRIAL AND THAT SAID TAPES WERE NOT PRESENTED TO THE JURY.

The tools used in police investigation today are extremely sophisticated. One of the major items used by the enforcement authorities is the taping of certain conversations of suspected lawbreakers. This type of surreptitious taping of conversations occurred in the case below.

Yet the government chose not to introduce the tapes themselves as evidence. The government offers testimony of the Drug Enforcement Administration agent that the recordings were very poor. The defense moved to have the tapes heard by the court. (Transcript 167, line 8, FF). The court overruled such objection.

If the basis of the criminal acts are conversation, and the conversation is recorded, this Court in landmark decisions from *United States v. Nixon,* 418 U.S. 683 (1974) through the recent decision of *Richard Nixon v. Warner Communications, Inc., et al.,* 46 L.W. 4321, ____U.S.____ decided April 18, 1978, holds that the tapes should be heard by the trier of fact. By overruling

the objection for the admission of the tapes, the trial judge allowed the *government* to decide what conversations on the tapes were relevant and what was not relevant by illiciting only the agents impression of what said agents felt was important to the trial.

The tapes made by the agents for the Drug Enforcement Administration were the best evidence as to the conversations held between the agents and the defendants. As such they should have been produced and presented to the jury as the trier of fact.

Should the tapes be overlong the court could have gone through the same procedure done in the District Court in the case of *United States v. Mitchell*, 377 F. Supp. 1326 (DC, 1974). See footnote No. 3 in *Nixon v. Warner Communications, Inc., et al., supra.* Such was not done to the detriment of the rights of the Petitioner under the Fifth Amendment to the United States Constitution. This deprivation should require a reversal of the decision below and a remand for new trial.

POINT VII.

DOES THE FAILURE OF PRIVATELY EMPLOYED COUNSEL TO INFORM AND DISCLOSE TO THE DEFENDANT/PETITIONER-CLIENT INFORMATION THAT HE IS DISCUSSING AND ULTIMATELY DOES ENTER INTO A LEGAL PARTNERSHIP FOR THE PRACTICE OF LAW WITH COUNSEL FOR PETITIONER-CLIENT'S CO-DEFENDANT, SUCH CO-DEFENDANT'S INTEREST AT THE TRIAL BEING IN CONFLICT WITH THE PETITIONER, SO TAINT AND COLOR SUCH LEGAL REPRESENTATION TO EFFECTIVELY DENY THAT CLIENT'S SIXTH AMENDMENT GUARANTEE TO INDEPENDENT LEGAL REPRESENTATION AFFORDED BY THE CONSTITUTION OF THE UNITED STATES.

The charge of criminal conspiracy is, by its very nature, one which puts each defendant adverse to each other. The ultimate defense to a conspiracy is to say that the accused conspirator was not involved in the conspiracy. Each conspirator, to save himself, is looking to point the finger at the other saying it was him and not me.

It follows therefore, that the counsel for any accused conspirator must look to have his client placed separate and apart from all others in the conspiracy. It is incumbent upon the counsel for said accused to act independently to serve the interest of his client.

It is long been held that the same attorney should not be representing multiple criminal defendants without the full and complete understanding of said defendants that there might be potential conflicts involved between the interests of said defendants. This court in the case of *Holloway v. State of Arkansas*, 46 LW 4289,____U.S.____, (1978) upheld the right to separate and independent counsel where potential conflict among and between accused defendants was raised to the court. In *Holloway*, the attorney for the accused defendants brought this to the attention of court. The attorney in *Holloway* felt there was actual conflict between the defendants. He was acting alone. There was no co-counsel.

It has long been held that attorneys from the same firm should not represent multiple defendants in criminal actions where said defendants might have conflicting interests at the trial. This rule is established and is followed in Florida. *Youngblood v. State*, 206 So. 2d 665 (Fla. 3rd DCA, 1968), *Turner v. State*, 340 So. 2d 132 (Fla. Appellate, 1976).

The Sixth Amendment guarantee of the assistance of counsel includes the right to counsel whose loyalty is not divided between clients with conflicting interests. *Glazer v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, 1942; *Baker v. State*, 202 So. 2d 563 (Fla., 1967); *Marshall v. State*, 273 So. 2d 412 (Fla. 2nd DCA, 1973). It is immaterial whether such counsel is appointed by the court or selected by the defendant. *Craig v. U.S.*, 217 F. 2d 355 (6th Cir., 1954).

The record is clear in the pleadings filed by the attorney for Petitioner, OLIVETI, that at the time of trial

and certainly at the time of the appeal to the Fifth Circuit, that said attorney was in negotiation and ultimately formed a partnership for the practice of law with the attorney for the co-defendant, Thomas. The Petitioner's prior attorney at the time, in pleadings to enlarge the time for the filing of the appeal to the Fifth Circuit, mentions and begs the court's indulgence to allow said expansion of time by reason of his forming of the partnership with his co-counsel at the trial level; to-wit, defendant Thomas' attorney.

The question, therefore, is raised on when the conflict begins to affect the Petitioner. It is the position of Petitioner, OLIVETI on this Petition for Writ of Certiorari to the Fifth Circuit, that his counsel at the time of trial and on the appeal to the Fifth Circuit was in violation of the Disciplinary Rule 5-105 of the Florida Code of Professional Responsibility in that he was the *de facto* partner of the attorney for co-defendant, Thomas.

It is difficult at the appellate level to second guess the strategic moves and decisions of the trial attorney for a defendant. However, if the record would show that one conspirator had *sixteen (16) meetings* with the Drug Enforcement Administration agents and another conspirator had but *two (2) meetings*, and further that the co-conspirator with sixteen meetings had a criminal record of felony convictions and that the accused co-conspirator with two meetings (your Petitioner) had no convictions of any crimes and that latter could take the witness stand to impress the jury with his credibility for truth and veracity and lack of criminal past, would not the failure of the production of such testimony be colored by the fact that the prior counsel for said con-

spirator was contemplating a legal partnership with the attorney for the co-defendant, Thomas.

The record at the trial court and at the Fifth Circuit Court of Appeals does not reflect other than in the pleadings attached as the Appendix to this Petition, that the counsel for Petitioner, OLIVETI, ever disclosed to the court any potential conflict of interest to his client and his relationship with the counsel for co-defendant, Thomas. The mere fact of the joining of both counsel and the joining by their decision of the appeals for both Thomas and Petitioner, OLIVETI, jointly to the Fifth Circuit, cloths Petitioner, OLIVETI with the acts of his co-defendant at the trial level, Thomas. Such adoption of the appeal of Thomas puts Petitioner, OLIVETI, at a clear disadvantage. The proof of this disadvantage is the reading of the first two points in this Petition for Certiorari, as compared with the first two major questions raised on appeal at the Fifth Circuit. Both talk of the same precedents, however the factual situations surrounding defendant Thomas was much more extensive and damning than those surrounding Petitioner, OLIVETI. A candid reading of the two points raised on the appeal to the Fifth Circuit and the Petition to this Honorable Court is self evident as to the deadweight that Thomas gives to the Petitioner, OLIVETI's appeal at the Fifth Circuit.

The attorney for the Petitioner, OLIVETI at the trial level and at the appeal at the Fifth Circuit was a member of the Florida Bar at all times relevant to this Petition in good standing with said Bar and a member of the Federal Bar for the Southern District of Florida and admitted to practice before the United States Court of Appeals for the Fifth Circuit. The applicable code to be

adhered to by any attorney practicing before the courts of Florida is the Florida Code of Professional Responsibility. DR5-105(C) states in part:

> ". . . a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each *consents* to the representation after *full disclosure* of the possible effect of such representation . . ."

A legal partnership or firm is considered "a lawyer" under the Disciplinary Rule and would necessitate the full disclosure spoken about in the Rule. The record reflects the partnership of the counsel for the Petitioner, OLIVETI and the counsel for his co-defendant at the trial and appeal, Thomas.

Petitioner, OLIVETI did not comprehend or understand the impact of the ultimate partnership of his trial attorney and the attorney for his co-defendant, Thomas until the counsel for this Petition for Certiorari entered the picture. Upon inquiry with the Petitioner before taking this Petition to this Honorable Court, OLIVETI had no idea that the attorney for him at the trial and appellate level was in fact a partner with the attorney for his co-defendant and adversary. It was only upon inquiry by new counsel at the level of this Petition, that the Petitioner OLIVETI discovered not only of the partnership arrangement of the counsel below, but the fact that his personally employed counsel did not argue his appeal at the Fifth Circuit, but said appeal argument was made by the original attorney for Thomas and the joint appeal taken by the attorneys in their new partnerships for both defendants Thomas and OLIVETI to the Fifth Circuit, was done without the knowledge nor

consent of this Petitioner as to a joint appeal joining the defendants together.

The Petitioner submits that there was no disclosure of the relationship between the two counsels below and this failure to disclose is, in effect, an ethical violation which defeats the letter, purpose and spirit of the Sixth Amendment to the United States Constitution for independent legal representation.

The Petitioner would therefore submit, that the inherent conflict of interest between his counsel and the counsel for his co-defendant at trial and on appeal, acted as a full denial of the Sixth Amendment right to independent legal counsel and would require a reversal of the Fifth Circuit opinion below.

CONCLUSION

For the foregoing reasons, Petitioner urges that the Petition for the Writ of Certiorari be granted.

Respectfully submitted,

GEDRICH & STEIN

BY:_____

Harvey N. Gedrich
303 S.E. 17th St., Suite 307
Fort Lauderdale, Florida 33316
Telephone: (305) 462-7200
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished to Solicitor General, Department of Justice, Washington, D.C. 20530, this 6th day of May, 1978.

GEDRICH & STEIN

By:_____
Harvey N. Gedrich

Attorney for Petitioner

Appendix

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Benton Franklin THOMAS and
Joseph Thomas Oliveti,
Defendants-Appellants.

No. 77-5136.

United States Court of Appeals,
Fifth Circuit.

Feb. 9, 1978.

By judgments of the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, Chief Judge, the defendants were convicted of knowingly and intentionally conspiring to import cocaine and marijuana into the United States and they appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) trial court's instruction that jury must find an overt act was more favorable than defendants were entitled to; (2) there was sufficient evidence from which jury could believe that defendants were guilty although they may have taken no action to execute the conspiracy; (3) police action in offering at one time to supply an airplane crew and at another time the name of a foreign supplier of cocaine was not so outrageous as to violate Fifth Amendment rights of defendants; (4) there was a prima facie case of conspiracy established before admission of hearsay statements of

coconspirator, and (5) the giving of modified Allen charge after less than two hours of deliberation was not reversible error.

Affirmed.

1. Criminal Law — 1172.7

Instruction, in prosecution for knowingly and intentionally conspiring to import cocaine and marijuana into the United States, stating that jury must find that an overt act had been committed by one of the coconspirators to convict placed a greater burden on Government than it was required to shoulder under statute and thus inured to the advantage of defendants rather than their prejudice. Comprehensive Drug Abuse Prevention and Control Act of 1970, §1013, 21 U.S.C.A. §963.

2. Conspiracy — 47(12)

There was an abundance of evidence from which jury could believe beyond reasonable doubt that defendants did unlawfully conspire to import cocaine and marijuana into United States in violation of statute, although they may have taken no action to execute the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §1013, 21 U.S.C.A. §963.

3. Constitutional Law — 257
Criminal Law — 37(8)

Offer by Drug Enforcement Agency agents during course of conspiracy to knowingly import cocaine and marijuana into United States to supply an airplane and

crew and the name of a foreign supplier of cocaine did not constitute police conduct which was so outrageous as to violate defendants' Fifth Amendment rights to due process, and did not bar defendants' prosecution for conspiracy or require instruction on defendants' predisposition in light of such conduct. Comprehensive Drug Abuse Prevention and Control Act of 1970, §1013, 21 U.S.C.A. §963; U.S.C.A.Const. Amend. 5.

4. Criminal Law — 427(5)

Where at beginning of Government's case, DEA agents testified to events and conversations of meetings held with defendants and other coconspirator and stated that one of the defendants offered to smuggle cocaine and marijuana into United States and that the other defendant and coconspirator would accompany him on the clandestine operation, such statements made in the presence of other defendant and coconspirator were sufficient to establish a prima facie case allowing admission of hearsay statements of coconspirator. Comprehensive Drug Abuse Prevention and Control Act of 1970, §1013, 21 U.S.C.A. §963; Federal Rules of Evidence, rule 104, 28 U.S.C.A.

5. Criminal Law — 865(1)

Where jury, because of lateness of hour, was dismissed on a Friday afternoon after only one hour of discussion and returned on the following Monday morning and after about 45 minutes deliberation foreman sent a note to judge that jury could not reach a unanimous verdict, trial court's action in giving a modified Allen charge, in which no deadline was set and jury was warned not to surrender honest convictions for sake of

reaching unanimity, was not an abuse of discretion and did not prejudicially place pressure on jurors to reach a unanimous verdict as claimed by defendants. Comprehensive Drug Abuse Prevention and Control Act of 1970, §1013, 21 U.S.C.A. §963.

Appeals from the United States District Court for the Southern District of Florida.

Before COLEMAN, HILL, and RUBIN, Circuit Judges.

COLEMAN, Circuit Judge.

Along with Jacob Cochran,[1] Benton Franklin Thomas and Joseph Thomas Oliveti were charged in a one-count indictment with knowingly and intentionally conspiring to import into the United States cocaine and marijuana in violation of 21 U.S.C.A. §963. After being found guilty in a trial by jury, Thomas was sentenced to one year in prison and three years on special parole while Oliveti was sentenced to six months in prison and three years special parole. They appeal.

The defendants argue that the trial court committed reversible error in that it (1) admitted hearsay statements before a prima facie case of conspiracy was established and the evidence, as a matter of law, was insufficient to prove conspiracy; (2) the federal agents acted in such an outrageous manner as to deny the defendants due process; (3) the trial court erred when it refused to instruct the jury regarding predisposition of the defendants when federal agents acted in an allegedly outrageous manner; (4) the trial court erred in denying a motion for acquittal based on entrapment as a matter of law; (5) the trial court erred in giving a modified "Allen charge" to the jury when it had deliberated less than two hours; (6) the trial court failed to declare a mistrial after the prosecuting attorney made several allegedly prejudicial comments; and (7) the trial court erred when it failed to dismiss the indictment because the prosecuting attorney failed to present the grand jury with exculpatory evidence in her possession.

[1]Also indicted as a coconspirator was Gerald Patrick Hemming. Hemming only participated in one meeting with Thomas in late March, 1976. The record is unclear as to the disposition of the charge against Hemming. Jacob Cochran was to have been tried with Thomas and Oliveti but failed to appear. The trial court tried the case against Thomas and Oliveti, severing Cochran until such time as he could be found and brought to trial.

After reviewing the applicable law, and the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we affirm the convictions.

I. FACTS

This conspiracy prosecution was based almost in its entirety upon conversations the defendants had with undercover Drug Enforcement Administration ("DEA") agents. The agents met with Thomas more than fourteen times and with Oliveti twice, but they never purchased, confiscated or saw any narcotics. Other than an agreement that sometime in the future the defendants would import some cocaine no act of illegality was established.

defendants-appellants and Cochran were indicted for conspiracy and arrested.

[1] In summary, we look upon this as a most unusual case. There were many meetings and much talk — a lot of smoke and no fire. The indictment alleged various overt acts as having taken place in furtherance of the conspiracy, but these consisted solely of the meetings, in which the talk took place. It would appear that in drafting the indictment the prosecutor was proceeding under 18 U.S.C. §371, which does require an "act to effect the object of the conspiracy". The defendants, however, were not indicted under that statute but, instead, were charged, as the indictment recited, under 21 U.S.C. §963,[2] a section which prescribes no such requirement, see United States v. Palacious, 5 Cir. 1977, 556 F.2d 1359, 1364, n. 9; United States v. Beasley, 5 Cir. 1975, 519 F.2d 233, 247, vacated and remanded on other grounds, 425 U.S. 956, 96 S.Ct. 1736, 48 L.Ed.2d 201 (1976) (no overt act was required under the conspiracy to distribute statute, 21 U.S.C. §846, which is similar to the conspiracy to import narcotics statute used here, 21 U.S.C.§963); United States v. Bermudez, 2 Cir. 1975, 526 F.2d 89, 94 (no overt act required for conviction under 21 U.S.C. §846). The trial court instructed the jury that they must find that an overt act had been committed by one of the conspirators. (Tr. 460). We can easily understand why it did so because several Fifth Circuit cases have proceeded under the assumption that 21 U.S.C. §963 or its sister statute, dealing with conspiracy to distribute, 21 U.S.C. §846, requires that overt acts be alleged and proved. See United States v. Bright, 5 Cir. 1977, 550 F.2d 240, 241; United States v. Seelig, 5 Cir. 1974, 498 F.2d 109, 112, and United States v. Toombs, 5 Cir. 1974, 497 F.2d 88, 94. In fact, this instruction placed a greater burden on the government than it was required to shoulder and thus inured to the advantage of the defendants rather than their prejudice.

[2] A thorough analysis of the trial record convinces us that there was an abundance of evidence from which a jury could believe beyond a reasonable doubt that the defendants did indeed unlawfully conspire although they may have taken no action to execute the conspiracy, see United States v. Johnson, 5 Cir. 1974, 496 F.2d 1131.

II. POLICE CONDUCT

[3] Next, the defendants argue that an offer by the DEA agents during the course of the conspiracy to supply an airplane and crew at one time and the name of

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[2] 21 U.S.C. §963 provides, "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 18 U.S.C. §371 on the other hand states, "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

This is not the first time a specific conspiracy statute has been held not to require an overt act to be proven. See Singer v. United States, 323 U.S. 338, 340, 65 S.Ct. 282, 89 L.Ed. 285 (1945) (no overt act required for conspiracy offense under draft evasion statute); Nash v. United States, 229 U.S. 373, 378, 33 S.Ct. 780, 57 L.Ed. 1232 (1913) (same for the Sherman Act).

a foreign supplier of cocaine at another was police conduct so outrageous that it violated their Fifth Amendment rights to due process. Further, they contend that this violation would bar their prosecution or, in the alternative, require the trial court to instruct the jury that if they found the police conduct was outrageous it would avoid their predisposition to conspire.

The defendants cite Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), and United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) but we are of the opinion that these cases militate against defendants' position.

In Hampton, the Supreme Court held that a criminal defendant should not be automatically acquitted simply because the narcotics he sold were supplied by a government agent. In Russell, a government agent provided an ingredient necessary to manufacture an illegal drug. The Court held that the agent's participation in the criminal activity was not of such an intolerable degree as to bar prosecution.

A reading of those cases reveals that government agents in both Russell and Hampton actually participated or provided a necessary element of the crime. The Supreme Court held in Russell and Hampton that the government agents' actions did not bar conviction. Here, we have DEA agents who only offered aid but never helped or participated in a substantive criminal act. The offers appear to have been efforts to flush out further evidence of cocaine smuggling activity. There may be instances where the actions of law enforcement agents are so outrageous as to bar prosecution, but we do not find that in this case.

The defendants also argue that the trial court should have acquitted them because, as a matter of law, they had been entrapped. While entrapment may defeat a conspiracy charge it will not do so if the criminal intent originates with the conspirators, even though the government furnishes the opportunity to carry out the crime. United States v. Puma, 5 Cir. 1977, 548 F.2d 508, 510. The evidence shows that these defendants were knowledgeable about the narcotics trade; they discussed various methods to smuggle contraband into the country; and they appeared anxious to receive a down payment for a future shipment. They were willing, not induced, participants in what went on here.

III. PROSECUTORIAL MISCONDUCT

The defendants urge that we should reverse their convictions because of prosecutorial misconduct both before the grand jury and at trial. The defendants cite several instances of statements made by the prosecuting attorney which they allege prejudiced their opportunity for a fair trial. A review of the trial instances reveals that the statements complained of were not prejudicial or were adequately corrected by instructions by the trial court so that they could not have had a prejudicial effect on the jury.

Also complained of was the failure of the government to present evidence to the grand jury which the defendants thought would have been exculpatory. This contention is wholly without merit.

IV. PRIMA FACIE CASE; SUFFICIENCY OF THE EVIDENCE

Appellants argue that the trial court reversibly failed to comply with Rule 104, Fed.R.Evid.:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges. . . .

Under the teachings of United States v. Ochoa, 5 Cir. 1977, 564 F.2d 1155, 1156, this argument fails.

[4] At the beginning of the government's case, the DEA agents testified to the events and conversations of the July meetings held with defendants Thomas and Oliveti and co-conspirator Cochran. The agents testified that Oliveti offered to smuggle cocaine and marijuana into the United States. Oliveti went further to say that Thomas and Cochran would accompany him on the clandestine operation. These statements were made in the presence of Thomas and Cochran. This was enough and established a prima facie case, United States v. Ochoa, supra; United States v. Amato, 5 Cir. 1974, 495 F.2d 545, 549, cert. denied, 419 U.S. 1013, 95 S.Ct. 333, 42 L.Ed.2d 286; United States v. Oliva, 5 Cir, 1974, 497 F.2d 130, 132-33.

V. THE "ALLEN CHARGE"

[5] The trial in this case ended on a Friday afternoon. The jury began deliberations on Friday but

because of the lateness of the hour it was dismissed after an hour of discussion. It returned the following Monday morning. After forty-five minutes deliberation the foreman sent a note to the judge stating that it could not reach a unanimous verdict. After discussion by counsel from both sides, the Court recalled the jury and gave the following charge:

> You should endeavor to reach an agreement, if at all possible. The case has been ably tried by both sides. In endeavoring to arrive at a verdict, you must keep in mind that in order to return a verdict each of you must agree. You have a duty to consult with one another and to deliberate with a view to reach an agreement if it can be done without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> You should examine the issue submitted to you with an open mind and with candor and with proper regard and deference to the opinions of others.
>
> In the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you are convinced that it is erroneous.
>
> You should not, however, surrender your honest conviction as to the weight or the effect of the evidence solely because of the opinion of

your fellow jurors or for the mere purpose of returning a verdict. Yet you should listen to each other's arguments with a disposition to be convinced.

I want you now to return to the jury room and resume your deliberations and discuss the matter amongst yourselves in a friendly spirit and endeavor to agree upon a verdict if you can do so.

I will ask you to return to your jury room for further deliberations. (Tr. 484-485).

The defendants concede that an "Allen" charge is not improper in this Circuit. United States v. Bailey, 5 Cir., 1973, 480 F.2d 518 (en banc). They argue, however, that the giving of the charge when the jury had deliberated for less than two hours was an abuse of discretion and prejudicially placed pressure on the jurors to reach a unanimous verdict.

The judge did not arbitrarily call the jury back to give the instruction. He acted only in response to word from the jury that a unanimous verdict could not be reached. At that point he gave only a modified form of the "Allen" charge, within the guidelines of United States v. Skinner, 5 Cir. 1976, 535 F.2d 325. (Tr. 480). No deadlines were set and the jury was warned not to surrender honest convictions for the sake of reaching unanimity. The Court struck from the charge language that was considered misleading by the defendants. (Tr. 483).

While elapsed time prior to the charge could in ordinary circumstances be considered unusually short, the judge did not act of his own motion with no reported inability to agree. The jury had reported an impasse and was seeking direction. The giving of the charge, as phrased, did not produce reversible error.

The convictions are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5136

JOSEPH THOMAS OLIVETTI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE BRIEF

COMES NOW the Appellant, JOSEPH OLIVETTI, by and through his undersigned attorney, and moves for an extension of twenty (20) days within which to file the Appellant's brief in this cause, and as grounds therefore would states as follows:

1. The Appellant's brief is due on or about May 20, 1977.

2. No previous extensions have been granted in this cause.

3. The below signed counsel during the period for the filing of the brief in this cause has moved his office to a new location, hired new em-

ployees, formed a new firm, and lost considerable working time during the month of May.

4. The request for the extension herein is not made for the purposes of delay.

5. The below signed counsel has been diligently preparing the appeal, and is likewise diligently working on other appeals, including the United States of America vs. Nell, Docket No. 77-5117 now pending before the Fifth Circuit.

WHEREFORE, in light of the foregoing, the Appellant moves this Honorable Court for only one twenty day extension, and represents that should this court see fit to grant the extension, the brief in this cause will be timely filed without further request for extensions.

Respectfully submitted,

/s/ P. D. Aiken
P. D. Aiken
Attorney for Appellant
1700 E. Las Olas Boulevard
Suite 300
Fort Lauderdale, Florida 33301
(305) 462-4600

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the United States Attorney's Office, 14 N.E. 1st Avenue, Miami, Florida, this 5th day of May, 1977.

/s/ P. D. Aiken
P. D. Aiken

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5136

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BENTON FRANKLIN THOMAS and
JOSEPH THOMAS OLIVETTI,
Defendants-Appellants.

JOINT MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE BRIEF

COME NOW the Appellants, BENTON FRANKLIN THOMAS and JOSEPH THOMAS OLIVETTI, by and through their undersigned attorneys, and respectfully move this Honorable Court for an Order granting an additional two (2) weeks within which to file their briefs. As grounds therefore the Appellants would state as follows:

1. That Appellants' briefs are presently due for filing on June 2, 1977. That the undersigned attorneys are presently involved in three other appeals within this Circuit.

2. That the undersigned attorneys are presently involved in United States of America vs. Peter Porreca and Christopher Broderick, Case No. 77-6044-Cr-JE, United States District Court, Southern District of Florida.

3. That more importantly, however, the undersigned attorneys have recently re-located their law office to the present address of Suite 300, 1700 E. Las Olas Boulevard, Fort Lauderdale, Florida, 33301.

4. That said transition has caused numerous and unexpected business interruptions and necessities, to wit: the hiring of employees, ordering of equipment, furnishings, fixtures, supplies, machinery, etc.

5. That in addition to the above, the air conditioning system is constantly under repair and due to the intense heat within the office, long periods of interruptions are caused thereby.

6. That the undersigned attorneys and the other employees within the law firm anticipate the office being furnished and completed on or before June 17, 1977.

7. That the undersigned attorneys intend to file a joint brief in the above styled cause.

8. That the undersigned attorneys for Appellants, as former Assistant United States Attorneys are well aware of this Court's plan and policy for the expeditious handling of all criminal appeals without delay and therefore would not make the above Motion except for emergency circumstances.

9. The undersigned attorneys have been in contact with the United States Attorney's Office and said office has no objection to an extension of time within which to file Appellants' brief.

WHEREFORE, based upon the above and foregoing, your Appellants respectfully request an additional two (2) weeks within which to file their brief in the above captioned matter.

/s/ P. D. Aiken
P. D. Aiken, Esq.
Attorney for Joseph Olivetti
Suite 300
1700 E. Las Olas Boulevard
Fort Lauderdale, Florida 33301
462-4600

/s/ Kerry J. Nahoom
Kerry J. Nahoom, Esq.
Attorney for Benton Thomas
Suite 300
1700 E. Las Olas Boulevard
Fort Lauderdale, Florida 33301
462-4600

WE HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to the Assistant United States Attorney, 14 N.E. 1st Avenue, Miami, Florida, this 1st day of June, 1977.

/s/ P.D. Aiken
P. D. Aiken, Esq.

/s/ Kerry J. Nahoom
Kerry J. Nahoom, Esq.

APPENDIX D

77-5136

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5136

BENTON FRANKLIN THOMAS
JOSEPH THOMAS OLIVETI,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Southern District of Florida

JOINT BRIEF OF APPELLANTS

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5136

BENTON FRANKLIN THOMAS and
JOSEPH THOMAS OLIVETI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

RULE 12 STATEMENT FOR REHEARING EN BANC

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the attached decisions of the United States Court of Appeals for the Fifth Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court. (See attached petition)

Respectfully submitted,

AIKEN, NAHOOM & DAMORE
Attorneys for Petitioners
Suite 300
1700 E. Las Olas Blvd.
Ft. Lauderdale, Florida 33301
462-4600 — 947-1014/Dade

By: /s/ P. D. AIKEN
P. D. Aiken, Esq.
Attorney for Oliveti

By: /s/ Kerry J. Nahoom,
Kerry J. Nahoom, Esq.
Attorney for Thomas

WE HEREBY CERTIFY that a copy of the foregoing has been mailed to the United States Attorney's Office, 300 Ainsley Building, 14 NE 1st Avenue, Miami, Florida, 33132, this 17th day of February, 1978.

/s/ P. D. Aiken
P. D. Aiken, Esq.

/s/ Kerry J. Nahoom
Kerry J. Nahoom, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 77-5136

BENTON FRANKLIN THOMAS and
JOSEPH THOMAS OLIVETI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REHEARING EN BANC

COME NOW the petitioners, BENTON FRANKLIN THOMAS and JOSEPH THOMAS OLIVETI, by and through their undersigned attorneys, and respectfully petition this Honorable Court for a rehearing en banc. As grounds therefor, your petitioners would state as follows:

1. That Benton Franklin Thomas and Joseph Thomas Oliveti were co-appellants in case number 77-5136, and appeal from judgments of the United States District Court for the Southern District of Florida;

2. That by opinion dated February 9, 1978, this Court affirmed petitioners' district court convictions for conspiracy under Title 21, U.S.C. §963;

3. That said opinion is in direct conflict with this Circuit's opinions in United States v. Salinas-Salinas, 555 F.2d 470, 473 (5th Cir. 1977); United States v. Bright, 550 F.2d 240, 241 (5th Cir. 1977), (opinion written by Judge Fay); United States v. Barrera, 547 F.2d 1250, 1256 (5th Cir. 1977), (opinion written by Judge Ainsworth); United States v. Isaacs, 516 F.2d 409, 410 (5th Cir. 1975), (opinion written by Judge Brown); United States v. Reynolds, 511 F.2d 603, 607 (5th Cir. 1975), (opinion written by Judge Morgan); United States v. Guajardo, 508 F.2d 1093, 1095 (5th Cir. 1975), (per curiam opinion by Gewin, Goldberg and Dyer); United States v. Seelig, 498 F.2d 109, 112 (5th Cir. 1974), (opinion written by Judge Dyer); United States v. Toombs, 497 F.2d 88, 94 (5th Cir. 1974), (opinion written by Judge Ainsworth); and United States v. Perez, 489 F.2d 51, 61 (5th Cir. 1973), (opinion written by Judge Brown);

4. That the above eight (8) decisions of this Circuit require that an overt act be proved in a 21 U.S.C. §963 or 846 conspiracy;

5. That overt acts were alleged in the indictment by the government but not only were those not proved, but also no overt act whatsoever was proved;

6. That the February 9, 1978, opinion as to your petitioners' opinion was written by Judge Coleman which is in direct conflict with the opinion in United States v. Salinas-Salinas, infra, also written by Judge Coleman;

7. That further, petitioners contend that the panel misinterpreted and did not rule upon their last point

pertaining to the duty of an Assistant United States Attorney, acting as legal advisor, to present evidence to a grand jury which evidence may constitute a defense as a matter of law;

8. That petitioners respectfully contend that the February 9, 1978, opinion affirming their convictions is not based upon sufficient evidence of a conspiracy especially as to Oliveti.

WHEREFORE, your petitioners pray that this Honorable Court enter an Order granting this their petition for rehearing en banc.

Respectfully submitted,

AIKEN, NAHOOM & DAMORE
Attorneys for Petitioners
Suite 300
1700 E. Las Olas Blvd.
Ft. Lauderdale, Florida 33301
462-4600 — 947-1014/Dade

By: /s/ P. D. Aiken
P. D. Aiken, Esq.
Attorney for Oliveti

By: /s/ Kerry J. Nahoom
Kerry J. Nahoom, Esq.
Attorney for Thomas

WE HEREBY CERTIFY that a copy of the foregoing has been mailed to the United States Attorney's Office, 300 Ainsley Building, 14 NE 1st Avenue, Miami, Florida, 33132, this 17th day of February, 1978.

/s/ P. D. Aiken
P. D. Aiken, Esq.

/s/ Kerry J. Nahoom
Kerry J. Nahoom, Esq.

APPENDIX F

FEB 3 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-371-Cr-CA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BENTON FRANKLIN THOMAS,
JOSEPH THOMAS OLIVETTI et al.,
Defendants.

JOINT MOTION FOR JUDGMENT OF ACQUITTAL AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COME NOW the Defendants, BENTON FRANKLIN THOMAS and JOSEPH THOMAS OLIVETTI, by and through their undersigned attorneys, pursuant to Rule 29(c), Federal Rules of Criminal Procedure, and file this, their Motion for Judgment of Acquittal, as to the charge contained herein, and in support thereof allege as follows:

1. That the facts of the case adduced at trial showed an "alleged" conspiracy from an unknown time up to the date of the indictment (August, 1976);

2. That the facts disclosed at trial demonstrated discussions about cocaine and marijuana from January of 1976 to August, 1976; the evidence revealed the Defendant, THOMAS, was to deliver six (6) kilograms of cocaine by February 1, 1976; he failed to produce offering an excuse and thereafter failed to produce on other occasions offering similar excuses; that Defendant, OLIVETTI, allegedly was to assist in the smuggling of the cocaine and marijuana, but never did; that in May of 1976, the government, due to the fact that the Defendants had not produced, offered to provide an aircraft, a flight crew and expenses for the Defendants to obtain the contraband; thus, the government offered to provide the manner and means of carrying out the illegal objective of the conspiracy, to-wit: to import controlled substances into the United States; not being satisfied with the above and having no takers on their offer, the government, in July of 1976, offered to provide 100 kilos of cocaine from a third party in South America; thus, the government by July, 1976, had not only offered the manner and means to carry out the illegal objective of the conspiracy; but also, the illegal objective itself, to-wit, the contraband; that such governmental conduct far surpasses the providing of "a mere opportunity" to commit a crime by one "ready and willing to commit it"; that, in fact, having gone further than a "mere opportunity" (Group Supervisor Peter M. Scrocca, Drug Enforcement Administration even testified that the above was against DEA policy) the government proved that the Defendants were not predisposed to commit the crimes alleged because said Defendants never took advantage of the government's generous offers; that, therefore, the above constituted entrapment as a matter of law entitling your Defendants to discharge;

3. That since the government's activity in this case was so outrageous, your Defendants should have been given their requested jury instruction concerning overreaching participation by government agents; more specifically, that if the government's activity was so shocking to the universal sense of justice, then the jury need not consider the predisposition of the Defendants; that it was error to refuse said requested jury instruction.

Respectfully submitted,

BASSETT & NAHOOM
Attorneys for Defendant, Thomas
713 N. E. Third Avenue
Fort Lauderdale, Florida 33304
Telephone: 763-2121

By _____
KERRY J. NAHOOM

P. D. AIKEN, ESQ.
Attorney for Defendant, Olivetti
Suite 202 - Justice Building
524 S. Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: 462-8319
Miami: 947-1014

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Joint Motion was mailed to AUSA Karen Atkinson, 300 Ainsley Building, Miami, Florida 33132, this 1st day of February, 1977.

KERRY J. NAHOOM

P. D. AIKEN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-371-Cr-CA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BENTON FRANKLIN THOMAS,
JOSEPH THOMAS OLIVETTI, et al.,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR JUDGMENT OF ACQUITTAL

In U.S. v. Bueno, 447 F.2d. 903 (5th Cir. 1971), the Fifth Circuit held that the defense of entrapment may be established as a matter of law; thereafter, in U.S. v. Russell, 411 U.S. 423, 93 S.Ct. 1637 (1973), the Supreme Court noted the Bueno decision, but neither expressly approved nor disapproved of its holding. U.S. v. Workopich, 479 F.2d. 1142, 1145 (5th Cir. 1973). However, in Russell, the Court observed, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-432, 93 S. Ct. at 1643. Hampton v. U.S., ____U.S.____, 96 S.Ct., 1646, 1649 (1976). Subsequently, the Fifth Circuit has stood steadfast in its posi-

tion that entrapment may be established as a matter of law. See U.S. v. Workopich, supra; U.S. v. Oquendo, 490 F.2d. 161 (5th Cir. 1974); U.S. v. Mosley, 496 F.2d. 1012 (5th Cir. 1974).

In the case at bar, the undisputed facts are that in May, 1976 four (4) months after the first narcotic discussions began, the government because of the Defendants' non-existent efforts to smuggle contraband into the United States offered to provide the manner and means to do same, to-wit: an aircraft, a flight crew and expenses; thereafter, in July of 1976, the government offered to provide 100 kilos of cocaine. Thus, the government offered to provide not only the manner and means of carrying out the conspiracy; but also, offered to provide the contraband itself. In short, the government offered to provide the illegal objective of the conspiracy, to-wit: to import contraband into the United States. The government offers, which were not accepted, constituted the very substance of the crime charged. Oquendo, supra, at 163. This exact situation is the type of governmental conduct condemned in all of the above-cited cases. The policy and logic behind each of the above-cited cases is to proscribe this type of law enforcement activity which results in a denial of due process.

Finally, your Defendants submit that at the trial of this cause this Court, relying upon Hampton v. U.S., refused to grant their Motion for Acquittal based upon entrapment as a matter of law. Most respectfully, the undersigned counsel point out that Hampton, is not controlling. The Hampton case held that a defendant was not entitled to an entrapment defense where his predisposition was conceded. In the case sub judice, predisposition is neither admitted nor conceded. In fact,

the government's own evidence of its generous offers demonstrated that the Defendants were not predisposed, that is, were not ready and willing to commit the crime charged. Had they been so disposed, all they had to do was board the government's plane, manned by the government's flight crew, paid for by the government itself, be flown to South America by the government, load the government's cocaine on the government plane, be flown back to the United States by the government's flight crew, and finally smuggle into the United States the government's cocaine. If the above facts do not demonstrate entrapment as a matter of law, then there exists no possible situation where such a defense can be raised.

WHEREFORE, based upon the above and foregoing Motion and Memorandum of Law, your Defendants respectfully request that this Honorable Court enter an Order granting thier Joint Motion for Judgment of Acquittal.

Respectfully submitted,

BASSETT & NAHOOM
Attorneys for Defendant, Thomas
713 N.E. Third Avenue
Fort Lauderdale, Florida 33304
Telephone: 763-2121

By_____
KERRY J. NAHOOM

P. D. AIKEN, ESQ.
Attorney for Defendant, Olivetti
Suite 202 — Justice Building
524 S. Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: 462-8319
Miami: 947-1014

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Support of Joint Motion for Judgment of Acquittal was mailed to AUSA Karen Atkinson, 300 Ainsley Building, Miami, Florida 33132, this 1st day of February, 1977.

KERRY J. NAHOOM

P. D. AIKEN

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-371-Cr-CA

UNITED STATES OF AMERICA
Plaintiff,

vs.

BENTON FRANKLIN THOMAS, JOSEPH THOMAS OLIVETTI et al,
Defendants.

JOINT MOTION FOR NEW TRIAL AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COME NOW the Defendants, BENTON FRANKLIN THOMAS and JOSEPH THOMAS OLIVETTI, by and through their undersigned attorneys, pursuant to Rule 33, Federal Rules of Criminal Procedure, and file this, their Motion for a New Trial, and in support thereof would show this Honorable Court as follows:

1. That the trial in this cause commenced on Thursday morning, January 13, 1977, and concluded late Friday afternoon, January 14, 1977, thereby taking two full days to complete the government's case;

2. That on Friday, January 14, 1977, the jury deliberated for approximately 30 minutes before being sent home for the weekend; That a substantial amount of that time was spent by, 1) electing a foreman, and 2) deciding, in response to this Court's inquiry, whether to continue deliberations on Friday, return Saturday or Monday; That, thereafter the jury returned to the courtroom (within this same 30 minute time period) and stated they could not decide; That this Court then dismissed the jury until Monday, January 17, 1977, at 9:00 A.M. at which time they were to continue their deliberations; That on Monday, January 17 at approximately 10 to 10:15 A.M., the jury reported by written note that they could not reach a unanimous verdict; That this Court immediately thereafter and over objections from defense counsel gave a "supplemental or modified Allen charge";

3. That, thereafter, a jury verdict of guilty was returned against your Defendants as to the charge contained in the above-numbered indictment;

4. That the trial in this cause took two (2) full days for the government's case alone; That through cross-examination, the Defendants raised the difficult and often confusing question of entrapment; That this Court instructed the jury on the cumbersome law of conspiracy and the issue of entrapment; That due to the above, the "supplemental or modified Allen charge" should not have been given after a mere (at the most) one hour and thirty to forty-five minutes of jury deliberations; That the giving of said charge under the facts and circumstances of the case at bar was coercive in nature requiring the jury to reach a unanimous verdict; That this Court sullied the sanctity of the jury's

deliberations by its "extra-Allen nudge" given after such a short period of time; That said judicial intervention violated due process and your Defendants' rights under the Fifth and Sixth Amendments to the United States Constitution.

Respectfully submitted,

BASSETT & NAHOOM
Attorney for Defendant, Thomas
713 N.E. Third Avenue
Fort Lauderdale, Florida 33304
Telephone: 763-2121

By_____
KERRY J. NAHOOM

P. D. AIKEN, ESQ.
Attorney for Defendant, Olivetti
Suite 202
Justice Building
524 S. Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: 462-8319
Miami: 947-1014

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Joint Motion was mailed to AUSA Karen Atkinson, 300 Ainsley Bldg., Miami, Florida 33132, this 1st day of February, 1977.

KERRY J. NAHOOM

P. D. AIKEN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-371-Cr-CA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BENTON FRANKLIN THOMAS,
JOSEPH THOMAS OLIVETTI, et al.,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR NEW TRIAL

In support of their Joint Motion for New Trial, your Defendants rely upon the following case law and authority.

> Allen is dead and we do not believe in dead law. Mr. Justice Clark, Progress of Project Effective Justice — A Report on the Joint Committee, 47 J. Am. Jud. Soc'y., 88-90 (1963)
>
> . . . there is small, if any, justification for its (Allen) use. Green v. U.S., 309 F.2d 852, 854 (5th Cir. 1962).
>
> Judge Brown, in his dissenting opinion in Huffman v. U.S., 297 F.2d 754, 759 (5th Cir. 1962).

In an en banc hearing, the Fifth Circuit, in U.S. v. Bailey, 480 F.2d. 518 (5th Cir. 1973), considered the propriety of the Allen charge. Six (6) judges of this circuit, in a concurring opinion, referred to it as "this abusable relic" and pointed out that its use "is an invitation to perennial appellate review".

The original panel in U.S. v. Bailey, supra, termed the charge "an abusable relic" which created a possibility of prejudice whenever given and subsequently served as "an overly fertile source of appeals". 468 F.2d. at 668, 669.

The Allen charge both deserves and receives a healthy disrespect in our Courts. U.S. v. Amaya, 509 F.2d. 8, 12 (5th Cir. 1975).

The sanctity of jury deliberations cannot be sullied by a trial judge's extra-Allen nudge. Amaya, supra, at 13.

In discussing the parameters of the Allen charge, the Fifth Circuit has said that it will "unflinchingly" act to correct the trial judge's error in straying from the recognized parameters. U.S. v. Cheramie, 520 F.2d. 325, 330 (5th Cir. 1975).

ABA Standards relating to Trial by Jury, §5.4 (1968).

For an excellent discussion of the "Allen" situation, see Kersey v. State, 525 S.W.2d. 139 (S. Ct. Tenn. 1975).

Applying the above to the facts sub judice, your Defendants respectfully submit that this Court "jumped the gun" when it gave its "supplemental or Allen-type charge" after only a maximum of one hour and forty-five minutes of jury deliberation. In so doing, this Court brought about the assertions raised in numerous texts and legal opinions that the Allen charge, in one form or another, has tantalized the criminal defense bar, tortured the trial bench and tormented the appellate courts throughout the nation. Kersey, supra, at 142. Additionally, this Court's impatience resulted in its intervention into the jury's deliberations. As cuationed by Judge Goldberg in U.S. v. Amaya, supra, at page 13,

> In Bailey we approved a bare branch; we must always be ready to prune to insure that it does not fructify. The sanctity of jury deliberations cannot be sullied by a trial judge's extra-Allen nudge. (Emphasis added)

Under the facts and circumstances of this case, and the complex jury instructions, the "Allen-type charge" should not have been given after a mere one hour and thirty-forty-five minutes of jury deliberations. Having done so was error by this Court, resulting in all of the above condemned evils.

WHEREFORE, based upon the above and foregoing Motion and Memorandum of Law, your Defendants respectfully request this Honorable Court to enter an Order granting their Motion for New Trial.

Respectfully submitted,

BASSETT & NAHOOM
Attorneys for Defendant, Thomas
713 N.E. Third Avenue
Fort Lauderdale, Florida 33304
Telephone: 763-2121

By_____
KERRY J. NAHOOM

P. D. AIKEN, ESQ.
Attorney for Defendant, Olivetti
Suite 202 — Justice Bldg.
524 S. Andrews Avenue
Fort Lauderdale, Florida 33301
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Miami: 947-1014

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Support of Motion for New Trial was mailed to AUSA Karen Atkinson, 300 Ainsley Building, Miami, Florida, 33132, this 1st day of February, 1977.

KERRY J. NAHOOM

P. D. AIKEN

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-371-Cr-CA

[FILED FEB 22 1977]

UNITED STATES OF AMERICA
Plaintiff

v.

BENTON FRANKLIN THOMAS, et al
Defendants

ORDER

(1) DENYING DEFENDANTS' JOINT MOTION FOR A NEW TRIAL; and

(2) DENYING DEFENDANTS' JOINT MOTION FOR JUDGMENT OF ACQUITTAL

THIS MATTER having come before the Court on defendants' Thomas and Olivetti's joint motion for (1) new trial, and (2) judgment of acquittal, and the Court having considered all the evidence presented at trial and in light of the applicable law, it is hereby

ORDERED AND ADJUDGED that:

(1) Defendants' joint motion for new trial is DENIED. The Court did NOT give the Allen charge. Rather it gave only the non-objectionable portions of a modified "Allen" charge which was approved by the Fifth Circuit Court of Appeals. In fact, in order to avoid any prejudice to the defendants, the Court deleted all portions of this modified charge to which defendants objected.

(2) Defendants' joint motion for judgment of acquittal is DENIED. In United States v. Haggins, Slip. Op. No. 76-1512, July 24, 1976, 5th Circuit, Judge Tuttle laid down the following standard of review:

> The question the trial court should have answered was: "On this evidence do I find that a reasonably minded jury must necessarily entertain a reasonable doubt?" If this question is answered in the affirmative, then a judgment of acquittal should follow.

Judge Tuttle, citing United States v. Smith, 493 F.2d 24, 26 (5th Cir. 19), stated that:

> "Additionally, the test is not whether the trial judge . . . concludes that the evidence fails to exclude every reasonable hypothesis but that of guilt, but whether the jury might reasonably so conclude."

The only point defendants raise on this motion is that the Court should find entrapment as a matter of law. Based upon the foregoing standard as applied to the

evidence, the Court does not find that a reasonably minded jury must necessarily entertain a reasonable doubt as to the question of entrapment. The cases cited by the defendant deal with a fact situation where the defendant took the stand and his testimony was uncontradicted by the Government as to his predisposition to commit the crime. In the instant case, the defendants offered no evidence to contradict the agents' testimony that was offered to prove that the defendants were predisposed to committing the crimes charged. At the request of the defendants, the Court charged the jury on the question of entrapment since this defense may have been put in issue by the Government's case in chief. Nevertheless, the Court finds that the evidence adduced was such that a reasonably minded jury must not necessarily entertain a reasonable doubt that the Government proved that the defendants were guilty of the crimes charged and that the defendants were predisposed to committing the crimes charged.

ENTERED at Miami, Florida, this 16th day of February, 1977.

/s/ C. Clyde Atkins
United States District Judge

cc: U.S. Attorney (Atkinson)
Kerry J. Nahoom, Esq.
P. D. Aiken, Esq.

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-371-Cr-CA
21 USC 963 (marijuana)
M/S $15,000, 5 years plus
2 yr. special parole term
21 USC 963 (cocaine)
M/S $25,000, 15 years plus
3 yr. special parole term

UNITED STATES OF AMERICA

v.

BENTON FRANKLIN THOMAS,
GERALD PATRICK HEMMING,
JOSEPH THOMAS OLIVETI,
and
JACOB COCHRAN

INDICTMENT

The Grand Jury charges that:

Commencing at a time unknown to the Grand Jury and continuing up to the date of this indictment, at Dade and Broward Counties, in the Southern District of Florida, the defendants,

BENTON FRANKLIN THOMAS,
GERALD PATRICK HEMMING,
JOSEPH THOMAS OLIVETI,
and
JACOB COCHRAN,

did wilfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with other persons to the Grand Jury unknown, to commit offenses against the United States, to wit: to violate Section 952(a) of Title 21, United States Code.

It was part of said conspiracy that the defendants would knowingly and intentionally import into the United States from a place outside thereof controlled substances, to wit: quantities of cocaine, a Schedule II narcotic controlled substance, and quantities of marijuana, a Schedule I non-narcotic controlled substance.

The Grand Jury further charges that the defendants, in furtherance of and to effect and achieve the goals of the conspiracy, did, at or about the time and places hereinafter referred to, commit certain overt acts, among which are the following:

OVERT ACTS

1. On or about January 9, 1976, BENTON FRANKLIN THOMAS met with Special Agent Herbert Williams and Special Agent Mario Perez of the Drug Enforcement Administration at Fort Lauderdale, Florida.

2. On or about January 19, 1976, BENTON FRANKLIN THOMAS met with Special Agent Herbert

Williams and Special Agent Robert Fredericks of the Drug Enforcement Administration at Fort Lauderdale, Florida.

3. On or about February 9, 1976, BENTON FRANKLIN THOMAS met with Special Agent Robert Fredericks and Special Agent John Adrejko of the Drug Enforcement Administration at Miami, Florida.

4. On or about March 31, 1976, GERALD PATRICK HEMMING met with Special Agent Robert Fredericks and Special Agent Armando Marin of the Drug Enforcement Administration at Fort Lauderdale, Florida.

5. On or about July 14, 1976, BENTON FRANKLIN THOMAS, JOSEPH THOMAS OVIVETI and JACOB COCHRAN met with Special Agent Armando Marin of the Drug Enforcement Administration at Miami, Florida.

All in violation of Title 21, United States Code, Section 963.

A TRUE BILL

_____
Foreman

ROBERT W. RUST
UNITED STATES ATTORNEY

By: Stephen M. Pane
For: Donald L. Ferguson
Assistant United States Attorney